

DECISION

OF THE UNITED STATES

WASHINGTON D. C. 20548

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Attachment A

FILE: B-183086

DATE: DEC 5 1975

MATTER OF: Everett Turner and David L. Caldwell - Retroactive Temporary Promotions for Extended Details to Higher Grades

- DIGEST:
1. Two Bureau of Mines employees were detailed to higher grade positions in excess of 120 days and no prior approval of extension beyond 120 days was sought from Civil Service Commission. Employees are entitled to retroactive temporary promotions for period beyond 120 days until details were terminated because Board of Appeals and Review, CSC, has interpreted regulations to require temporary promotions in such circumstances.
 2. While employees, who are determined to be entitled to retroactive temporary promotions on basis of mandatory requirement of regulations, must satisfy eligibility criteria for promotions, including 1 year service in grade required by the "Whitten Amendment," 5 U. S. C. § 3101, note, Civil Service Commission may waive service requirement in individual cases of a meritorious nature involving undue hardship or inequity. However, decision of Board of Appeals and Review, CSC, awarding retroactive temporary promotion to employees did not indicate whether waiver was granted and is, therefore, remanded for a determination of this issue.
 3. Interpretations of regulations by agency charged with their administration are entitled to be given great weight by a reviewing authority. Board of Appeals and Review, Civil Service Commission, has interpreted Commission's regulations to require temporary promotion of employees detailed to higher grade positions for over 120 days where prior Commission approval has not been sought. We have concurred in the Board's interpretation and therefore 52 Comp. Gen. 920 (1973) is overruled.

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4. Agency heads and authorized certifying officers have statutory rights to an advance decision from the Comptroller General on propriety of paying make-whole remedies ordered by appropriate authorities. Thus, Board of Appeals and Review, CSC, when ordering make-whole remedies should permit agencies an opportunity to exercise their right to an advance decision from the Comptroller General prior to implementation of remedies.

This matter concerns the claims of Everett Turner and David L. Caldwell, employees of the Bureau of Mines, Department of the Interior, for backpay alleged to be due under a decision rendered by the Board of Appeals and Review, United States Civil Service Commission (CSC), on April 19, 1974, that ordered the agency to give the two employees retroactive temporary promotions. The agency complied with the decision and processed the ordered retroactive temporary promotions. The Board's decision also advised the employees to apply to the Comptroller General for backpay consistent with the decision, and they have filed such claims with our Office.

The record indicates that on April 18, 1971, David L. Caldwell and Everett Turner were appointed by the Bureau of Mines to the positions of Assistant Assessment Officer, GS-301-13, and Deputy Assessment Officer, GS-301-14, respectively. The grade GS-15 position of Assessment Officer was vacant at the time, and Mr. Turner immediately assumed the duties of that position as he was obligated to do under his new position description. Subsequently, on March 16, 1972, the Staff Associate, by a memorandum to the Director, designated Mr. Caldwell as Acting Deputy Assessment Officer. Both Turner and Caldwell served officially in their "Acting" positions until July 5, 1973, when the agency designated another employee to be the Acting Chief, Office of Assessment and Compliance Assistance. After that designation, the duties of Turner and Caldwell became those of their official positions.

The two employees filed a grievance and appealed to the CSC's Appeals Examining Office, alleging that they had suffered a reduction in rank. The Appeals Examining Office held that no reduction in rank had occurred in either case and, therefore,

that the matter did not come within the purview of the Commission's appellate jurisdiction over adverse actions by agencies under part 752, subpart B, of the civil service regulations.

In reviewing the case the Board of Appeals and Review overruled the Appeals Examining Office's conclusion as to jurisdiction and found sufficient official action--notwithstanding the absence of any Standard Form 50 or equivalent--to bring the reduction-in-rank proceeding within the jurisdiction of the Civil Service Commission under FPM Supplement 752-1. Then, although the Board agreed that no reduction in rank had occurred, it found that the Bureau of Mines had violated the Commission's regulations requiring that temporary promotions be made for details of more than 120 days and that corrective action was required.

The Board of Appeals and Review's decision first quoted the applicable regulation on details to higher grade positions, located at subparagraph 3-4e, subchapter 3, chapter 300, of the Federal Personnel Manual (FPM), which reads as follows:

"Details to higher grade positions. Except for brief periods, an employee should not be detailed to perform work of a higher grade level unless there are compelling reasons for doing so. Normally, an employee should be given a temporary promotion instead. If a detail of more than 60 days is made to a higher position, or to a position with known promotion potential, it must be made under competitive promotion procedures." (emphasis supplied.)

The Board then observed that in our decision 52 Comp. Gen. 920 (1973), which involved a factual situation similar to the present case, we had held that since the Federal Personnel Manual's provisions on temporary promotions (subchapter 4-4, chapter 335) contained no mandatory provision directing an agency to grant a temporary promotion where an employee temporarily serves in a higher grade position, the employee in that case was not entitled to a retroactive temporary promotion under the exception permitting such action where nondiscretionary administrative regulations or policies have not been carried out. We there distinguished

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40 Comp. Gen. 258 (1968) on the ground that the latter had involved a failure to carry out a mandatory regulation.

The Board stated that the rationale of 52 Comp. Gen. 920 correctly recognized the discretionary power of agencies over promotions, but added that the regulation relied on in that decision should not be viewed in a vacuum and that other related FPM regulations changed the effect of the regulation. The Board explained its rationale as follows (slip opinion, p. 7):

"While the above reasoning correctly recognizes the discretionary power of agency officials to grant or not grant promotions, this power does not exist in a vacuum. By considering it in the context in which it is authorized, i.e., in connection with details of employees to higher grade positions, some idea of its parameters or limits may be obtained. At FPM chapter 300, subchapter 8 on 'Detail of Employees', such limits are described at 8-3(b)(2) as follows:

"Since extended details also conflict with the principles of job evaluation, details will be confined to a maximum period of 120 days unless prior approval of the Civil Service Commission is obtained as provided in section 8-4f. All details to higher grade positions will be confined to a maximum initial period of 120 days plus one extension for a maximum of 120 days."

"At 8-4f, in turn, it is said:

"(1) When it is found that a detail will exceed 120 days, or when there is a question of the propriety of the detail, the agency must request prior approval of the Commission on Standard Form 59. (underscoring added.)"

"In view of the foregoing, it becomes clear that the discretionary authority of an agency official to grant a temporary promotion to an employee detailed to a higher grade position or to assign him to the

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position without a temporary promotion lasts, at most, for 120 days. At that point the agency must seek the approval of the Commission for any extension of the detail. By its failure to do so in the case at hand, the agency deprived both appellants of the Commission review concerning the propriety of their details at the end of 120 days as granted by the regulations cited above. Accordingly, corrective action is warranted consistent with what should have occurred at the end of 120 days. What should have occurred is expressed at FPM chapter 300, subchapter 8, section 8-4c:

'Except for brief periods, an employee should not be detailed to perform work of a higher grade level unless there are compelling reasons for doing so. Normally, an employee should be given a temporary promotion instead. * * *

Accordingly, the Board ordered the Bureau of Mines to grant temporary retroactive promotions as follows (slip opinion, p. 8):

"The corrective action, therefore, is that Messrs. Turner and Caldwell are deemed to have been temporarily promoted to the higher grade levels of the positions to which they were detailed for a period beginning 121 days after they were detailed and ending on the date their details were 'officially' terminated, in effect, July 5, 1973. To obtain payment for the period of service under these temporary promotions ordered by the Commission, the appellants should apply to the Comptroller General for backpay consistent with this opinion."

It is a general principle of law that interpretations of regulations by the agency charged with their administration are entitled to be given great weight by a reviewing authority. Udall v. Tallman 330 U.S. 1 (1965); Bowles v. Seminole Rock Co., 325 U.S. 410 (1945). In this connection, we note that the Board of Appeals and Review (now redesignated as the Appeals Review Board) is located within the Office of the Commissioners, United

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States Civil Service Commission, and is charged with the responsibility of deciding appeals by Federal employees arising under the laws, rules, and regulations administered by the Commission. Hence, decisions by the Board interpreting Commission regulations are entitled to be accorded the greatest deference. We concur in the Board's interpretation of chapter 300 of the Federal Personnel Manual to the effect that an agency's discretionary authority to retain an employee on detail to a higher grade position continues no longer than 120 days and that the agency must either seek prior approval of the Commission for an extension of the detail or temporarily promote the detailed employee at the end of the specified time period. Therefore, where an agency fails to seek prior approval of the Commission to extend an employee's detail period in a higher grade position past 120 days, the agency has a mandatory duty to award the employee a temporary promotion if he continues to perform the higher grade position.

Moreover, this rule is consistent with and analogous to our "reasonable time rule" set out in 53 Comp. Gen. 216 (1973), which requires that an incumbent employee of a newly reclassified upgraded position either be removed or promoted not later than the beginning of the fourth pay period after the date of the final position classification decision unless it prescribes a subsequent date. We believe that the 120-day period serves a similar purpose of providing agencies a reasonable time either to obtain prior approval from the Commission for an extension of the detail or to temporarily promote the employee.

As far as we are aware, the Board's decision on April 19, 1974, marks the first time that the Civil Service Commission has held that the FPM provisions on details to higher grade positions are mandatory and not discretionary. We regard the Commission's interpretation of its regulations governing details as a clarification rather than a substantive amendment of such regulations. 49 Comp. Gen. 15 (1969). In light of our concurrence with the Commission's view our decision in 52 Comp. Gen. 920, supra, which relied on our interpretation of the relevant regulations as being discretionary in nature, is hereby overruled. Instead, the Commission's interpretation of its regulations governing employee details, as enunciated by the Board of Appeals and Review, will apply.

We note that the agency, in complying with the Board decision, promoted Mr. Turner as of August 17, 1971. In this connection, section 1310 of the Act of November 1, 1951, 65 Stat. 757, as amended, 5 U.S.C. § 3101 note, commonly known as the Whitten Amendment, provides in pertinent part as follows:

"(c) The Civil Service Commission shall make full use of its authority to prevent excessively rapid promotions in the competitive civil service and to require correction of improper allocations to higher grades of positions subject to the Classification Act of 1949, as amended. No person in any executive department or agency whose position is subject to the Classification Act of 1949, as amended, shall be promoted or transferred to a higher grade subject to such Act without having served at least one year in the next lower grade." (Emphasis supplied.)

The above-quoted provision generally requires that an employee serve 1 year in the next lower grade before he is eligible for either a temporary or permanent promotion. Applying this requirement to the case before us, Mr. Turner apparently would not have been eligible for a promotion to GS-15 until April 18, 1972. However, the final proviso of section (c) of the Whitten Amendment states the following:

"Provided further, That, notwithstanding the provisions hereof, and in order to avoid undue hardship or inequity, the Civil Service Commission, when requested by the head of the agency involved, may authorize promotions in individual cases of meritorious nature."

The Board's decision does not mention the Whitten Amendment requirement and, therefore, it is not known whether consideration was given to this matter. In any event, it appears that the Board would have had authority to waive the time-in-grade requirements to avoid hardship or inequity if it chose to exercise its discretion to do so. Inasmuch as we are unable to determine the Board's position on this issue, we are remanding this question to the Board for a determination of whether Mr. Turner's temporary

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promotion should be effective as of August 17, 1971, under a waiver to the Whitten Amendment, or as of the beginning of the first pay period after April 18, 1972, which would be the earliest possible effective date if no waiver were granted. The Board should notify our Office of its determination in this matter. In either event Mr. Turner's promotion terminated on July 5, 1973.

The situation is different in the case of Mr. Caldwell inasmuch as he satisfied the time-in-grade requirements for promotion within 121 days after March 16, 1972, the date established by the Board as the beginning of his detail to the higher grade position. Hence, Mr. Caldwell's temporary promotion is proper from July 15, 1972, and would also terminate on July 5, 1973.

Inasmuch as the Board has in effect determined that the above employees have undergone an unjustified or unwarranted personnel action as a result of agency officials failing to comply with mandatory regulations, the employees are entitled to backpay under the Back Pay Act of 1966, 5 U. S. C. § 5596 (1970), and the Civil Service Commission's implementing regulations contained in 5 C. F. R., part 550, subpart H. Therefore, we are forwarding the claims of the employees to our Transportation and Claims Division for processing and settlements will be issued in due course.

The Board instructed the agency to implement its decision as follows (slip opinion, p. 9):

"Under section 772.307(c) of the Civil Service regulations, compliance with the Board's decision is mandatory and the administrative officer of the agency shall take the action recommended. The appropriate administrative officer is requested to furnish the Board of Appeals and Review, within 15 days after receipt of this decision, a copy of the official notification of personnel action documenting the accomplishment of the required corrective action. The agency's report should be addressed to the Board of Appeals and Review, U. S. Civil Service Commission, Washington, D. C. 20415, Attention: Compliance Desk."

The Board thereby required immediate agency compliance with its decision but, at the same time, the Board directed the employees

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to file a claim with the Comptroller General to obtain backpay consistent with the Board's opinion. We believe that the Board's order could be construed as infringing upon the authority of our Office.

With the redesignation of the Board of Appeals and Review as the Appeals Review Board the regulation cited by the Board was reissued as 5 C.F.R. § 772.310(g) (1975), and now provides that "the decision of the Board is final" and that "when corrective action is recommended, the agency shall report promptly to the Board that the corrective action has been taken."

Apparently the Board interprets the above-quoted regulations as granting it authority to direct agencies to immediately comply with its orders to provide make-whole remedies to employees covered by its decisions. We are of the opinion that there is a potential conflict between the Board's interpretation of these regulations and the Comptroller General's statutory authority under 31 U.S.C. §§ 74 and 82d (1970). In this connection it has been held that a regulation to the extent it is in direct variance with an unambiguous statutory provision is clearly void. Manhattan General Equipment Co. v. Commissioner of Internal Revenue, 297 U.S. 129 (1936); Mourning v. Family Publications Service, Inc., 449 F.2d 235, 241 (1971). The aforementioned statutes grant heads of executive agencies or authorized certifying officers of agencies the right to request and obtain an advance decision from this Office as to propriety of payments they are ordered to make. Accordingly, an agency or a certifying officer may properly delay the implementation of an order issued by the Board involving the expenditure of funds until it has obtained an advance decision from this Office. 54 Comp. Gen. 760 (B-180010, March 19, 1975), and 54 id. 921 (B-180095, April 30, 1975).

In the present case the Board ordered the agency to grant retroactive temporary promotions to the grievants and directed them to submit claims to our Office for backpay. Under this procedure it could be argued that once the retroactive promotions had been effected, the employees became entitled to the salaries of the positions to which they were appointed. Dianish et al. v. United States, 183 Ct. Cl. 702 (1968). Since the agency is required to process the retroactive temporary promotions within 15 days, the employees could argue that they would be

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entitled to a writ of mandamus to have the agency perform the ministerial act of paying them the money to which such promotion entitled them. McClendon v. Blount, 452 F.2d 381 (7th Cir. 1971). However, in deciding the propriety of payment of make-whole remedies, our Office is required to determine whether the awards conform to the requirements of law. Consequently, if we should determine that an award is not in conformity with a statute or regulation, additional personnel actions would be required to correct the employees' personnel records where such make-whole remedies have been implemented prior to a decision from our Office.

In view of the above, we suggest that the Board frame its future implementing instructions to agencies in such a manner as to allow agencies or certifying officers, in their discretion, to exercise statutory rights to seek advance decisions from this Office before implementation of the make-whole remedies is required. In the alternative, the Board could submit proposed make-whole remedies to this Office for advance decisions on the propriety of payment where there is any doubt as to their legality. Upon receipt of our decision on a particular make-whole remedy, the Board could then issue its decision, with the decision from this Office attached, and require that the approved make-whole remedy be immediately implemented by the agency.

R.F. KELLER

[Deputy]

Comptroller General
of the United States